LOKE YUEN CHENG & ANOR

v.

VIMTEX SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-02-319 OF 1994]
12 APRIL 1998

CONTRACT: *Deposit - Forfeiture of - Whether deposit a true deposit - Whether could be forfeited after contract rescinded - Contracts Act 1950, ss. 40, 56(1)*

CONTRACT: *Specific performance - Whether time of the essence - Whether contract lawfully rescinded - Whether a void contract - Waiver - Express term that time of the essence - Whether waived by conduct of party - Contracts Act 1950 ss. 40, 56(1), 65, 66*

On 14 August 1992, after having agreed to purchase two shophouses from the defendants/appellants for RM1,879,200, the plaintiff/respondent paid 10% of the purchase price. The date for completion of the contract was fixed for not later than three months from 14 August 1992, the balance of the purchase price having to be paid by the completion date. It was stipulated in the agreement that time was the essence of the contract. On 13 November 1992, the respondent's solicitors wrote to the appellants' solicitors for an extension of time of two months to pay the balance of the purchase price. The appellants granted the extension but after the respondent having failed to pay within the stipulated time, the appellants rescinded the contract on 14 January 1993.

The respondent commenced specific performance proceedings against the appellants. The appellants' defence was that time being the essence of the agreement, such agreement was rescinded by the appellants because of the respondent's failure to complete on time. Therefore specific performance could not be decreed on a void agreement.

The appellants applied to strike out the statement of claim under O. 18 r. 19 of the Rules of the High Court 1980. The trial court refused the application. Hence this appeal.

The issues for consideration were: (i) whether there was a waiver of the term that time was to be of the essence of the contract based on the conduct of the appellants who had allowed time which was fixed for completion to pass before granting the extension of time of two months to complete; and (ii) whether the appellants could forfeit the deposit after having rescinded the contract.

Held:
Per NH Chan JCA

[1] The appellants did not allow the respondent to try to remedy its default after 13 November had passed. They did not do anything to encourage the respondent to try to complete after that date. All that they did was to grant an extension of time to a fixed date (13 January 1993) to complete at the request of the respondent. The appellants' conduct therefore did not amount to waiver of the condition of time.

[2] If payment was a true deposit or earnest money, then the sum could lawfully be forfeited by the appellants. In this case the 10% of the purchase price was a true deposit and therefore could be forfeited.

Per Abu Mansor Ali JCA

[1] It was quite clear that the respondent had had the benefit of an extension and was duty bound to complete before the expiration of the extended date. Since they did not do so, in accordance with the terms of the agreement, the appellants were entitled to bring the agreement to an end and forfeit the deposit.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pada 14 Ogos 1992, setelah bersetuju membeli dua buah rumahkedai dari defendan/perayu untuk RM1,879,200, plaintif/responden telah membayar 10% harga belian. Tarikh penyempurnaan kontrak telah ditetapkan untuk tidak lebih dari tiga bulan dari 14 Ogos 1992, dengan baki harga belian harus dibayar sebelum tarikh penyempurnaan. Telah dinyatakan dalam perjanjian bahawa masa adalah intipati kontrak tersebut. Pada 13 November 1992, peguamcara responden telah menulis kepada peguamcara perayu untuk perlanjutan masa dua bulan untuk membayar baki harga belian. Perayu telah memberikan perlanjutan masa tetapi setelah responden gagal membayar dalam tempoh masa yang ditetapkan, perayu telah membatalkan kontrak tersebut pada 14 Januari 1993.

Responden telah memulakan prosiding perlaksanaan tertentu terhadap perayu. Pembelaan perayu adalah bahawa, dengan masa dijadikan intipati perjanjian, perjanjian tersebut telahpun dibatalkan oleh perayu disebabkan kegagalan responden untuk menyempurnakannya dalam tempoh masa. Maka perlaksanaan tertentu tidak dapat diperintahkan berdasarkan perjanjian yang terbatal.

Perayu telah memohon untuk membatalkan pernyataan tuntutan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Mahkamah perbicaraan telah menolak permohonan tersebut. Maka rayuan ini.

Isu-isu untuk dipertimbangkan adalah bahawa: (i) samada masa telah tidak lagi menjadi intipati berdasarkan tindakan perayu yang telah membenarkan masa yang ditetapkan untuk penyempurnaan untuk berlalu sebelum memberikan perlanjutan masa dua bulan untuk menyempurnakannya (ii) samada perayu boleh merampas deposit setelah membatalkan kontrak tersebut.

Diputuskan:

Oleh NH Chan HMR

[1] Perayu telah tidak membenarkan responden untuk cuba membetulkan pelanggarannya selepas 13 November berlalu. Mereka tidak berbuat apa-apapun untuk menggalakkan responden supaya cuba menyempurnakannya setelah tarikh tersebut. Apa yang perayu lakukan adalah hanya untuk memberikan suatu perlanjutan masa kepada suatu masa yang ditetapkan (13 Januari 1993) untuk menyempurnakannya seperti yang diminta oleh responden. Maka tindakan perayu tidak terjumlah kepada penepian syarat masa.

[2] Jikalau bayaran adalah suatu deposit yang sebenarnya ataupun wang cengkeram, maka jumlah tersebut boleh dirampas dengan sahnya oleh perayu. Dalam kes ini, 10% harga belian itu merupakan deposit yang sebenarnya dan dengan itu ianya dapat dirampas.

Oleh Abu Mansor Ali HMR

[1] Ianya adalah amat jelas bahawa responden telah memperolehi manfaat suatu perlanjutan masa dan ia bertanggunjawab menyempurnakannya sebelum tempoh masa yang dilanjutkan itu tamat. Oleh kerana ianya tidak berbuat demikian, berdasarkan terma-terma perjanjian tersebut, perayu adalah berhak menamatkan perjanjian tersebut dan merampas deposit.

[Rayuan dibenarkan.]

Cases referred to:
Barclay v. Messenger [1874] 43 LJ Rep (NS) 449 ***(refd)***
Buckland v. Farmer & Moody [1978] 3 All ER 929 ***(foll)***
Clough v. L & NWR [1871] LR 7 Exch 26 ***(refd)***
Fercometal v. Mediterranean Shipping Co [1989] 1 AC 788 ***(cit)***
Frost v. Knight [1872] LR 7 Ex 111 ***(dist)***
Horsler v. Zorro [1975] Ch 302 ***(cit)***
Lowe v. Hope [1970] Ch 94 ***(cit)***
Luck v. White [1973] 26 P & CR 89 ***(dist)***
Webb v. Hughes [1870] LR 10 Eq 281 ***(refd)***
Wong Kup Seng v. Jeram Rubber Estates Ltd [1969] 1 MLJ 245 ***(cit)***
Yee Chee Pang v. Wong Nam Sang Enterprise Sdn Bhd [1988] 1 CLJ 287 ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 40, 56(1), 65, 66, 76
Rules of the High Court 1980, O. 18 r. 19(1)

Other sources referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, 13th edn, p 277
Concise Oxford Dictionary, 9th edn
Contract of Sale of Land, Williams, 1930, pp 119, 121-123, paras 60, 61
Cyprian Williams' Great Heresy, Michael Albery, [1975] 91 LQR 337
Indian Contract and Specific Relief Acts, Pollock & Mulla, 1994, 11th edn, vol 1, pp 578, 694
Vendor and Purchaser, Williams, 1936, 4th edn, vol 2, pp 993, 1004, 1006

For the appellants - Khoo Chuan Swee; M/s Lovelace & Hastings
For the respondent - Quah Soon Wai; M/s Chung, Huang & Khalid

[Appeal from High Court, Kuala Lumpur; Suit No: S4-22-516-1993]

Reported by Mariette Peters-Goh

JUDGMENT

NH Chan JCA:

The Background

On 14 August 1992 the respondent (plaintiff) agreed to purchase two shophouses from the appellants (defendants) for RM1,879,200. A sum of RM187,920 (10% of the purchase price) was paid by the respondent to the appellants (cl. 3 of the sale and purchase agreement). The date for completion of the contract was stated in cl. 2 to be not later than three months from 14 August 1992 (the date of the agreement). The balance of the purchase price (RM1,691,280) was to be paid by the completion date (cl. 4.1). Time wherever mentioned shall be of the essence of the agreement (cl. 16).

On 13 November 1992, the respondent's solicitors wrote to the appellants' lawyers for an extension of time of two months to pay the balance of the purchase price. Clause 4.2 states:

> 4.2 Provided Always that the vendors shall on the written request of the purchaser made at any time prior to the expiration of the completion date grant to the purchaser an extension of time of a further period of two (2) months (hereinafter called the extended date) commencing from the date following immediately next after the expiration of the completion date to enable the purchaser to pay to the vendors' solicitors the balance of purchase price or any part thereof and Provided Further that the purchaser shall pay to the vendors interest on the balance sum or the outstanding part thereof from the commencement of the extended date until the date of payment to the vendors' solicitors of the balance of purchase price in full to be calculated daily at the rate of eight per centum (8%) per annum (hereinafter called the interest).

The appellants through their solicitors granted an extension (of two months) until 13 January 1993 to complete. They wrote (by their letter dated 30 November 1992) as follows:

> Your letter dated 13th November, 1992 sent by post was received by us on 23rd November, 1992 and the post mark on the cover is dated 20.11.92.
>
> Our clients are agreeable to grant your client a two (2) months extension within the time stipulated in clause 4.2 of the Sale and Purchase Agreement dated 14th August, 1992.
>
> We are to emphasize that completion *(sic)* shall take place on 13 January, 1993 and no further extension will be allowed.

The respondent failed to do so and, on 14 January 1993 the appellants through their solicitors Messrs T.K. Sen & Co. rescinded the contract, thus:

> By virtue of clause 19 of the said agreement, since you have failed to deposit the balance of purchase price with us within the extended date (13th January, 1993), we hereby give you notice that our clients terminate the said agreement with immediate effect and the said deposit is forfeited to our clients.

Clause 19 states:

> 19. If the purchaser fails to deposit the balance of purchase price within the completion date or the extended date the vendors shall be at liberty to terminate this agreement by notice in writing summarily and on termination aforesaid the purchaser's rights hereunder shall be ended and the said deposit shall be forfeited to the vendors who shall be at liberty to sell or otherwise deal with the said property in such manner as the vendors shall think fit and shall not be liable to account to the purchaser for any profit made on such sale or dealing.

Actually, s. 56(1) of the Contracts Act 1950 enables the contract to be rescinded *ab initio* which is not the same thing as in s. 40 of the Act which enables the contract to be terminated while leaving the rights under the contract to sue for damages on that footing intact. Section 56(1) reads:

> 56(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

This is what Pollock & Mulla on the *Indian Contract and Specific Relief Acts*, 11th Edn (1994), says of the Indian s. 55(1), which is similar to our s. 56(1). It reads, p. 578:

> Once the condition is not fulfilled as contemplated by the terms of the agreement when time is made the essence of the contract originally or subsequent thereto, the failure to perform the contract within the stipulated time gives a right to avoid the contract, which can be exercised while making the time essence of the contract, or subsequently thereto. In the notice making time the essence of contract the party can be intimated that in default of compliance with the requisition the contract will be treated as cancelled.

Here, in the present appeal, it is quite apparent that the appellants must have exercised their option solely under s. 56(1) and this could only mean annulling or cancelling the contract. The *Concise Oxford Dictionary* gives the meaning of the word "void" as meaning "invalid, not binding". So that, as here, where the intention of the parties was that time should be of the essence of the contract, it became voidable at the option of the appellants when the balance of the purchase price was not paid by the respondent when it was due on 13 January 1993. The appellants have exercised their option by rescinding the contract on 14 January 1993. Although the word the appellants had used was "terminate" which was also the word used in cl. 19, it seems clear to me that the appellants could only have exercised their option under s. 56(1) of the Act. The sense in which the word "terminate" was used by the appellants must be discovered from the context in which it was used and, I think there is really no doubt that the sense in which the word "terminate" was used in the letter of 14 January 1993 was that of rescinding the contract and not in the strict dictionary sense.

In any case, it seems to me really impossible to construe the word "terminate" in the present case in the sense as used in s. 40 of the Act which is that of accepting the promisor's breach as a repudiation discharging (putting an end to) the contract. Section 40 reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Section 40 speaks of the promisor having "refused to perform" or "disabled himself from performing" his promise which gives the promisee the right to put an end to (ie, terminate) the contract. Here, in the present context, there was no question of the respondent refusing to perform the contract. In fact, it had wanted to perform the contract by paying the balance of the purchase price if it could be granted an extension of time to do so. So that, in the present case, s. 56(1) was the sole provision in the Act that was applicable for the appellants to exercise their option which was to rescind the contract by their letter of 14 January 1993. It is impossible for s. 40 to apply in the present case because, if it were to apply, it would mean that we would be dealing with a wrongful repudiation of the contract by the respondent's refusal to pay and that the appellants would be consequently discharged from the contract by the appellants putting an end to it. Here, in the present case, there was no repudiation of the contract by the respondent refusing to pay at all.

Nevertheless, it is useful to know that there is a subtle but important difference in the wording of s. 40 and s. 56(1) of the Contracts Act.

In s. 40, the innocent promisee has the right to terminate ("put an end to") the contract.

In s. 56(1), the innocent promisee has the right to rescind ("becomes voidable at the option of the promisee") the contract. According to the *Concise Oxford Dictionary* (9th Edn) the word "rescind" means "abrogate, revoke, cancel."

In s. 56(1), where a purchaser fails to complete on time, time having been made of the essence, the contract becomes voidable at the option of the vendor who may rescind it in the strict sense of rescission *ab initio*, the consequence of which is *restitutio in integrum* (ss. 65 and 66 of the Act).

Whereas under s. 40, where a purchaser refuses to complete at the appointed time for performance, time having been made of the essence, the vendor may put an end to the contract.

So that, if there is a situation where time has been declared to be of the essence of the contract for the purchaser to pay the balance of the purchase price on a given date and the purchaser has refused to pay at the appointed time for performance, the vendor, in such a situation, can either terminate the contract under s. 40 or rescind it under s. 56(1) for the purchaser's failure to pay on the appointed time for performance. This is because by refusing to

complete at the appointed time (where s. 40 is applicable), the purchaser has also failed to complete on time (where s. 56(1) is applicable). (For the view in English law that on the breach by one party of an essential term (like where a purchaser fails to complete), time being of the essence, the other party can rescind *ab initio*, see *Horsler v. Zorro* [1975] Ch. 302 a decision of Megarry J, Williams on the *Contract of Sale of Land* (1930) p. 119, para 60, pp. 121-123, para 61, Williams on *Vendor and Purchaser* 4th Edn. (1936), vol. 2, pp. 993, 1004, 1006 and *Lowe v. Hope* [1970] Ch. 94, at 98 by Pennycuick J. For the contrary view in English law, see an article by the late Mr Michael Albery entitled *"Cyprian Williams' Great Heresy"* [1975] 91 LQR 337 and *Buckland v. Farmer* [1978] 3 All ER 929, at 943 by Goff LJ.) In this country, where a purchaser fails to complete, time being of the essence, the other party can rescind *ab initio* (s. 56(1)). Similarly, where a purchaser refuses to complete at the appointed time, time being of the essence, the other party can rescind *ab initio* (s. 56(1)) or, put an end to the contract (s. 40). It is only in the case where a purchaser announces his refusal to complete ahead of the time for completion, even though time is of the essence, that he cannot rescind. He can, of course, terminate the contract under s. 40.

The right to terminate the contract under s. 40 and sue for damages exists whether the repudiatory breach is "anticipatory," ie, in advance of the time for performance, or "actual," ie, at the time when performance is due: *Bullen & Leake & Jacob's Precedents of Pleadings*, 13th Edn, p. 277. Where a party wrongfully repudiated his contractual obligations in advance of the time for their performance, or, in other words, totally refused to perform them before the time for their performance arrives (ie, anticipatory repudiation), the innocent party has the right to terminate the contract immediately. On the other hand, the innocent party, if he pleases, may ignore the breach (that is, by not accepting the repudiation) and affirm the contract's continued existence, and await the actual time when performance is due for the promisor once again totally to refuse to perform his obligations (ie, actual repudiatory breach), and then terminate the contract (*Fercometal v. Mediterranean Shipping Co.* [1989] 1 AC 788, HL(E), *Frost v. Knight* [1872] LR 7 Ex. 111, 112 - 113). Cockburn CJ in *Frost v. Knight* put it thus (112 - 113):

> The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De La Tour*, 2 E & B 678 and *The Danube and Black Sea Co. v. Xenos* [1863] 13 CBNS 825 on the one hand, and *Avery v. Bowden* [1855] 5 E & B 714, *Reid v. Hoskins* [1856] 6 E & B 953, and *Barwick v. Buba* [1857] 2 CBNS 563 on the other,

> may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

However, this kind of situation will not apply to the present case as the respondent here did not refuse to pay the balance ("refused to perform" or "disabled himself from performing" are essential elements before s. 40 can be invoked)

Nonetheless, it is still essential to know the different legal consequences which will follow from the choice of exercising the option in either s. 40 or s. 56(1) as there are quite significant differences between the two sections.

In s. 40, exercising the option (even in a case where time is of the essence of the contract and the purchaser has refused to pay the balance at the time when performance is due) means that the contract is treated as discharged. The remedy is for the vendor to sue for damages under s. 76.

In section 56(1) (which only applies to cases where time is of the essence of the contract), exercising the option means that the vendor has annulled the contract so as to make it as though it has never been entered into, in which case he is entitled only to restitution and therefore the vendor could not sue the purchaser for damages for breach of the contract.

The consequences of rescission of a voidable contract are given in ss. 65 and 66. Section 65 reads:

> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.

And s. 66 states:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

See *Pollock & Mulla: Indian Contract and Specific Relief Acts,* 11th Edn (1994), vol. 1, p. 694:

> The use of the word 'voidable' is immaterial. Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes use of that option the agreement becomes void.

In *Clough v. L & NWR* [1871] LR 7 Exch 26, 37, Mellor J said:

> It is, however, quite true that no man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it; and therefore the London Pianoforte Company, on rescinding the contract, were bound to restore to Adams the money and the acceptance which they had obtained from him.

And in *Pollock & Mulla (supra),* at pp. 700, 701 (which refers to the Indian s. 65 which is similar to our s. 66), it reads:

> Section 65 contains the principle of restitution after benefit has been received and the agreement is later discovered to be void. The basis of the section is the doctrine of *restitutio in integrum* ... Unless the Court can, having regard to circumstances of the case, restore the parties to their original position, s. 65 would not be applicable. The section is not wider in scope, than the English doctrine of restitution. The obligation to pay compensation under s. 65 is quite different from a claim under the contract itself and the two cannot co-exist.

The Appeal

It is with the foregoing scenario as a backdrop that I turn to the present appeal. The respondent (purchaser) commenced specific performance proceedings against the appellants (vendors). The appellants' defence is that the parties having made time of the essence of the agreement for completion, the agreement was rescinded by the appellants because of the respondent's failure to complete on time. Therefore, specific performance could not be decreed on a void agreement. The appellants then followed with an application to strike out the statement of claim and for the action to be dismissed under O. 18 r. 19(1) of the Rules of the High Court 1980 and the inherent jurisdiction of the court. The court below refused the application. Hence the appeal to this court.

The question is whether the appellants by allowing the time fixed for completion to pass before granting the extension of time of two months to complete has made time no longer to be regarded as of the essence of the contract.

It is true that when time is of the essence of the contract and when the party who is in the right allows the time fixed for completion to pass and the parties go on negotiating, then time is no longer to be regarded as of the essence of the contract. See *Luck v. White* [1973] 26 P & CR 89, 95, Goulding J said:

> The notice to complete expired early in September. The vendors did not then, as they had threatened, either rescind the contract or resell the property. Instead they continued to discuss the possibilities of completion and ultimately agreed to November 16. It would have been easy for the vendors to reserve their rights in express terms. They might, for example, have extended the period for compliance with the notice to a specified date, time to be of the essence in that regard. Indeed, the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect. The vendors, however, did nothing of the kind. They encouraged the purchaser to try to complete notwithstanding the expiry of the notice, and there was nothing to tell him (that is, the purchaser) at what moment the axe would fall.

The judge formulated the principle in this way, at 96:

> If the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstance.

In *Webb v. Hughes* [1870] LR 10 Eq. 281, Malins VC found that on its construction the contract did not make time of the essence of the contract, but he observed that even if it had been of the essence of the contract the conduct of the parties was such as to show that that essential characteristic of time had been waived. He said, at 286:

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract.

See also *Wong Kup Seng v. Jeram Rubber Estates Ltd* [1969] 1 MLJ 245.

But the instant appeal is not a case of allowing time to pass and the parties went on negotiating for completion of the purchase. In fact, the appellants did not do anything between 13 November 1992 and 30 November 1992 except to grant the two months extension to a specified date (that is, 13 January 1993)

on 30 November and that only at the written request of the respondent which was received by the appellants on 23 November. There was no negotiation at all as nothing transpired between the appellants (vendors) and the respondent (purchaser) between the two dates (that is, between 13 November and 30 November) except for the silence and inactivity on the part of the appellants.

The lack of activity for such a short duration of time was not, in my opinion, sufficient enough to make time cease to be of the essence of the contract; see *Buckland v. Farmer & Moody* [1978] 3 All ER 929, 937, where Buckley LJ said:

> It is conceded by the plaintiffs that inactivity on the part of a vendor, who has made time of the essence of the contract, for a reasonable period, would not make time cease to be of the essence of the contract. The length of the time which elapsed here was not, in my opinion, sufficient of itself to deprive time of its character of being essential; but it is said that the case falls within the formulation of the principle which I have read from the judgment of Goulding J (*Luck v. White* [1973] 26 P & CR 89, 96) that, if the party who is in the right allows the defaulting party to try to remedy his default after an essential date has passed, he cannot then call the bargain off without first warning the defaulting party by fixing a fresh limit.

And Goff LJ said, at 942:

> Waiver, however, is based on encouraging the purchaser to think that he will be given time indefinitely and will not be cut off without further notice. Mere standing by is not enough, at all events unless it continues for an unreasonably long time, and there is no suggestion of that in this case.

Here, in the present case, the appellants did not allow the respondent to try to remedy its default after 13 November 1992 had passed. They did not do anything to encourage the respondent to try to complete after that date. All that they did was to grant an extension of time to a fixed date (that is, 13 January 1993) to complete at the request of the respondent under cl. 19. In my judgment, the appellant's conduct was not such as to amount to waiver within the encapsulation of the principle in the judgment of Goulding J (*Luck v. White* [1973] 26 P & CR 89, 96).

Indeed, if the parties have once made time of the essence of the contract, the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect (by Goulding J in *Luck v. White (supra),* at 95).

Buckley LJ in *Buckland v. Farmer & Moody (supra),* at 937, said:

> If a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date the time remains essential.

In *Barclay v. Messenger* [1874] 43 LJ Rep. (N.S.) 449, 456, Jessel MR said:

> It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time.

The extension granted to the respondent was an extension to a fixed date so that the time remains essential. In my judgment, the contract was rescinded by the notice to the respondent on 14 January 1993.

Finally, the question that comes to mind is, can the appellants forfeit the deposit after having rescinded the contract?

In *Yee Chee Pang v. Wong Nam Sang Enterprise Sdn Bhd* [1988] 2 MLJ 57, Hashim Yeop A. Sani SCJ, in delivering the judgment of the Supreme Court (Abdul Hamid CJ (Malaya), Hashim Yeop A. Sani and Syed Agil Barakbah SCJJ) in a case where time was declared to be of the essence of the contract, said, at 59:

> As regards the forfeiture of the deposit of $54,000, we have to look at the provision of the agreement in the matter of forfeiture of the deposit. Clause 1 of the agreement described the $54,000 as a payment "by way of deposit for the due performance by the purchaser of the several terms hereinafter contained." Clause 3 of the agreement provides that the balance of the purchase price shall be deposited with the common solicitor within a specified period and in default of which the deposit "shall be absolutely forfeited to the vendor" and the agreement shall absolutely determine and of no further force or effect.
>
> The crux of the matter is whether the $54,000 is a true deposit. If it is a true deposit or earnest money (the two terms being interchangeable) then the sum can lawfully be forfeited by the appellant – see also *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 71. Here the intentions of the parties as to what happens to the deposit are clearly expressed in the agreement. In our view, the $54,000 is a true deposit and can lawfully be forfeited.

But what about ss. 65 and 66 of the Contracts Act (which the Supreme Court seems to have overlooked)? Must not the deposit be returned to the respondent when the contract was rescinded under s. 56(1) of the Act?

Nonetheless, the Court of Appeal is bound by that decision. With the contract invalidated and the deposit lawfully forfeited, the action has to be dismissed. The appeal was allowed.

Abu Mansor Ali JCA:

We have unanimously allowed the appeal of the defendants/appellants against the decision of the learned judge given on 2 December 1994 who had dismissed the application of the defendants/appellants, under O. 18 r. 19 of the High Court Rules 1980, applying to strike out the respondent/plaintiff's statement of claim with costs. We gave the appellants cost before us and below and ordered that the deposit to be returned to the appellants.

The facts of the case were as follows. The appellants who were defendants in the lower court are the registered proprietor of two shophouses built on two lots on certificate of title no. 11525 for lot No. 65 and certificate of title no. 11523 lot No. 63 town and district of Kuala Lumpur (the said property).

The plaintiff/respondent is a company registered in Malaysia with a place of business at 97, Jalan Tuanku Abdul Rahman, Kuala Lumpur.

In accordance with a sale and purchase agreement dated 14 August 1992, entered between them, the defendants agreed to sell and the plaintiff agreed to buy the said property at the agreed price of RM1,879,200 (the said sale agreement).

Pursuant to cl. 3 of the said sale agreement, the plaintiff had paid the defendants a sum of RM187,920 as deposit, 10% of the price of the said property. And in accordance with cl. 2 of the said sale agreement the balance of the purchase price, totalling RM1,691,280, was to be paid in three (3) months of the date of the agreement, that is, on or before 13 November 1992 (hereinafter referred to as the 1st completion date) such payment to be made at the office of the defendants' advocate and solicitors.

By a letter dated 13 November 1992, the plaintiff wrote to the defendants through his solicitors asking the defendants for an extension of a further two (2) months until 13 January 1993, to pay the full purchase price of the said property (hereinafter referred to as the 2nd completion date). The defendants granted the extension asked for.

On 29 December 1992, the plaintiff, however, wrote to the defendants' solicitors proposing to the defendants that the plaintiff pay directly to the defendants, without having to go through the defendants' solicitors because, so says the plaintiff, of the difficulty experienced by the plaintiff in contacting the defendants' solicitors at his registered office at Suit 404B, Tingkat 4, Wisma Mirama, Jalan Putra, Kuala Lumpur especially after the plaintiff and plaintiff's solicitors had made so many futile attempts to contact the defendants' solicitors, so much so, that the plaintiff was of the opinion, that

the defendants' solicitors was avoiding the plaintiff. Needless to say the plaintiff was, at all material time, ready and willing to complete the sale even to the extent of visiting the 2nd defendant at his house in Singapore but the plaintiff was told to leave.

On 14 January 1993 the defendants terminated the sale agreement and forfeited the deposit without giving the plaintiff any notice whatsoever.

While waiting to complete the sale agreement, the plaintiff commissioned Noris Architect to draw plans for the plaintiff's proposed seven storey building block on the said property such plan was for approval by the Dewan Bandaraya Kuala Lumpur for which the plaintiff incurred expenses totalling RM42,590.

Plaintiff then brought an action against the defendants for specific performance or alternatively for the return of his deposit and damages for RM42,590 and cost.

By a summons-in-chambers dated 17 December 1993 the defendants applied under O. 18 r. 19 High Court Rules 1980 for the suit to be struck out on the ground that it discloses no reasonable cause of action, frivolous or otherwise an abuse of the process of the court. On 2 December 1994 the learned judge heard arguments and dismissed the defendants' application, holding that there are triable issues, in particular that although the agreement provided that time was of the essence, it was waived when it was extended by the defendants. The defendants then appealed against the decision of the learned judge.

Before us it was contended by the appellants that there was only one issue relevant to this appeal. Counsel for the appellants contended that, at the High Court, the evidence was based on documents which are not disputed by the parties.

Counsel submitted that in cl. 16 of the sale and purchase agreement it was not disputed that time, wherever mentioned, was to be of the essence. In cl. 4.2 thereof if an extension was sought, time could be extended by another two (2) months up to 13 January 1993 and counsel for the appellants contended that term was never waived and completion had to be on or before 13 January 1993.

Appellants' counsel submitted further that in the event that there was waiver, which was not the case, it must be shown by conduct on the part of the defendants showing such. Counsel submitted that the learned judge erred in not examining closely the services of letters for if she had, she would certainly have come to the conclusion that time was still of the essence and that there was no need for the case to go to trial.

In cl. 19 of the sale agreement, the appellants are empowered to terminate the agreement if there was no completion, by a notice in writing and when that is done the deposit in the vendor's hand shall be forfeited. In accordance with this clause the appellants had terminated the agreement *vide* their letter dated 14 January 1993.

Counsel submitted that reading cl. 16 of the sale agreement together with cl. 4.2 thereof, cl. 19 and the appellants' letter of 30 November 1995 it was a clear case that the extended time to perform was of the essence of the contract and clearly since the plaintiff failed to perform within the extended time, this matter became so, says the appellants' counsel, a clear case of construction and that the appeal should therefore be allowed and the statement of claim be struck out as vexatious.

For the respondent's counsel, Mr. Quah Soon Wai submitted that all they had to show was that the plaintiff's action has a reasonable chance of success. He contended that the agreement was wrongly terminated. He said that it was clear that the extension was wrongly given after the date of completion had expired. In cl. 4.2 of the agreement, the two months extension must be applied before the date of completion. Counsel submitted that there were facts which should be ventilated in a full trial and urged the court to consider their submission.

We upheld the submission of the appellants' counsel that there is no good reason that the case should go for trial. It was quite clear that the plaintiff had had the benefit of an extension and was duty bound to complete before the expiration of the extended date. Since they did not do so, in accordance with the terms of the agreement, the appellants were entitled to bring the agreement to an end and forfeit the deposit. Had the learned judge considered this submission, she would have come to the same conclusion. We therefore unanimously allowed the appeal and struck off the plaintiff's statement of claim with cost before us and below and set aside the judgment of the learned judge.